86-47

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1986

UNIGLASS INDUSTRIES,
A DIVISION OF
UNITED MERCHANTS AND MANUFACTURERS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For The Second Circuit

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QUESTIONS PRESENTED

1. Whether the six-month limitations period of § 10(b) of the National Labor Relations Act bars issuance of a complaint alleging an illegal refusal to rehire based upon an antinepotism policy when the sole foundation for the complaint is an alleged unfair labor practice that occurred at the time the antinepotism policy was implemented more than six months before the charge was filed?

2. Whether the Court below was correct in holding the six-month limitations period of § 10(b) of the National Labor Relations Act was equitably tolled until such time as the Company communicated to the rehire applicants the precise reason they were rejected for rehire each month they reapplied?

LIST OF PARTIES

Petitioner's Rule 28.1 list of parent companies, subsidiaries, and affiliates appears in the Appendix submitted as part of this Petition at page A-59.

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For The Second Circuit

The Petitioner, Uniglass Industries, respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit rendered April 17, 1986.

OPINIONS BELOW

The Court of Appeals issued its Order in a unreported opinion, affirming and enforcing an Order of the National Labor Relations Board. The Board's Order was issued

September 24, 1985, and is reported at 276 NLRB No. 35 (1985). This Order affirmed the decision of the Administrative Law Judge. The unreported Order of the Court of Appeals, the Board's Decision and Order, and the Administrative Law Judge's Decision appear in the Appendix submitted as part of this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered April 17, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

United States Code, Title 29:

§ 158(a)(1):

> It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 157 of this title. . . .

§ 158(a)(3):

> It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

§ 158(a)(4):

> It shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter. . . .

§ 160(b):

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and a service of a copy thereof upon the person against whom such charge is made. . . .

STATEMENT OF THE CASE

I. Nature of the Case and Proceedings Below[1]

On October 17, 1983, the Union filed an unfair labor practice charge alleging the Company violated §§ 8(a)(1), (3) and (4) of the Act; that since January 25, 1982, (a date almost three months outside of the six-month limitation period) the Company refused to recall from layoff or rehire Jeanette Pegram; since March 15, 1982, (a date one month outside of the limitation period) the Company refused to recall from layoff or rehire Charles Pegram, Elaine Honeycutt, and Jesse Levan; and since June 16, 1983, the Company discriminatorily discharged Jeffrey Smith.[2] The charge was later amended by the Union on December 2, 1983, the same day the Board issued the Complaint, to allege the refusals to recall or rehire Elaine Honeycutt and Charles and Jeanette Pegram occurred on April 20, 1983, (a date exactly one day within the limitations period in § 10(b) of the Act). The Board issued a Complaint alleging, *inter alia*, the Company discriminatorily refused to rehire Honeycutt and the

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[1] For convenience, the Administrative Law Judge is hereinafter referred to as the "ALJ"; Petitioner is hereinafter referred to as the "Company"; Respondent, National Labor Relations Board, is hereinafter referred to as the "Board"; and the Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC (Charging Party in proceedings before the Board) is hereinafter referred to as the "Union". References to the "Act" are to the National Labor Relations Act, as amended, 29 U.S.C. § 141, et seq.

[2] The allegation regarding discrimination against Jesse Levan was not included in the Complaint, and the finding that the Company discriminatorily discharged Jeffrey Smith is not at issue in this Petition.

Pegrams on or about April 20, 1983, and discriminatorily discharged Jeffrey Smith on June 16, 1983.

The case was tried before Board ALJ Hutton S. Brandon on April 24, 25, and 26, 1984, and decided by him on August 3, 1984. The ALJ found the Company had committed unfair labor practices within the meaning of §§ 8(a)(1), (3), and (4) by refusing to rehire Elaine Honeycutt, Charles Pegram, and Jeanette Pegram and by discharging Jeffrey Smith. The Company filed exceptions to the ALJ's decision. On September 24, 1985, the Board issued its Decision and Order affirming the ALJ's rulings, findings, and conclusions and adopted the recommended Order. The Company petitioned the United States Court of Appeals for the Second Circuit to set aside the Board's Order, and the Board filed a cross-application for enforcement. On April 17, 1986, the Court of Appeals denied the Company's petition for review and enforced the Board's Order.

II. Statement of the Facts[3]

Elaine Honeycutt, Charles Pegram, and Jeanette Pegram were among a group of approximately 150 employees laid off by the Company in 1982 because of poor business conditions. After being laid off for more than six months, they were subsequently terminated according to Company policy. They immediately

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[3] Petitioner recites only facts that pertain to the statute of limitations issues raised in this Petition.

submitted new applications, but were not rehired because the Company had no openings at that time. They updated their applications monthly.

In early 1983 the Company's business improved, and the Company was flooded with applications from former employees and prospective new hires. The Company received over 1600 applications in 1983, including almost 600 by the end of April. From 271 applications submitted in January and February of 1983, including 64 applications from former employees, the Company filled 35 jobs. Honeycutt, who had an application on file, was not hired in January or February 1983 because the Company hired more qualified, former employee applicants into her former position. Charles Pegram was not hired in January or February 1983 because he had specifically requested his old job on second shift, and the only positions filled in his former job were by rehires to the first and third shifts. Jeanette Pegram was not hired in January or February 1983 because the Company hired a former employee for the only job that came open for which she was qualified.[4]

During this period of expanding business and substantial hiring, the Company, for entirely legitimate business reasons, reimplemented an antinepotism policy

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[4] Over the Company's objection, the ALJ allowed Counsel for General Counsel to introduce evidence that the refusals to rehire the three alleged discriminatees in early 1983 violated the Act even though the refusals to rehire were outside of the § 10(b) limitations period. The ALJ's decision, enforced by the Board, states but makes no specific finding that prior to the reimplementation of the antinepotism policy the positions for which the Pegrams and Honeycutt were qualified were filled by rehires who were better qualified.

that had been dormant for many years.[5] Among other things, the policy prohibited hiring immediate family members of management. Incumbent employees related to management were not discharged but were "grandfathered" in under the policy. This was the same approach taken when the antinepotism policy was first adopted. The policy was reimplemented in the latter part of February 1983. The policy was communicated to all Company managers, supervisors, and personnel representatives. The policy was enforced uniformly without exception from that point forward.[6]

Elaine Honeycutt and Charles and Jeanette Pegram continued to update their applications monthly during early 1983. Elaine Honeycutt was not rehired for openings to her former job during January or February 1983 because the Company hired more qualified applicants. She was not hired after February 1983 because of the reinstitution of the antinepotism policy since her father was a supervisor and her hiring would have violated the reinstituted policy, which was uniformly enforced to deny jobs to all applicants related to management. Charles and

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[5] The policy was revived when the increased hiring began in February 1983 when a manager asked the Company to hire his son, and the Company decided that hiring immediate relatives of management created conflicts of interest, favoritism, discipline problems, and inconsistent treatment that the Company wanted to avoid.

[6] In addition to the alleged discriminatees, six other applicants related to management were denied employment due to the reinstituted antinepotism policy, three in March 1983 and one each in July, August, and September 1983.

Jeanette Pegram were not hired in January or February 1983 for reasons found by the Board to be non-discriminatory. They were not hired following the reinstitution of the antinepotism policy because they were immediate family members of supervisors Buford Clanton and Rayford Clanton.

When Elaine Honeycutt came by the plant to update her application, she was told the Company had no job openings for her and that she could continue updating her application.[7] In June 1983 Honeycutt requested a meeting with the Company's personnel manager to ask why she had not been rehired when the Company had hired persons into her former position. The personnel manager told her the Company had reinstituted its antinepotism policy in February 1983 and that she would not be rehired because she was a relative of management. On numerous occasions when the Pegrams came to the plant to update their applications in early 1983, they were told by Company representatives the Company had no jobs for them. Charles Pegram was told in January, February, and March 1983,". . . [T]here wasn't no openings; they was claiming they didn't have no openings time and again, that it wan't (wasn't) no use to come back." The Pegrams nevertheless continued to update their applications until the Company's personnel manager saw them in the personnel department in October 1983 and invited them

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[7] Company policy permitted all applicants, including rejected applicants, to update their applications monthly. The evidence showed the Company never refused to accept an application or prohibit an individual to update an application because of efforts to comply with federal civil rights laws. See, *Mang v. Blumenthal*, 26 FEP Cases 1353 (W.D. Pa. 1981).

into his office. He told them they would not be rehired because the Company had reinstituted the antinepotism policy which covered them as immediate family members of management.

III. The Board's Disposition of the Question Whether the Six-Month Limitations Period in § 10(b) of the Act Barred Issuance of the Complaint

Since the critical event--the Company's promulgation of the antinepotism policy and later application of the policy to bar rehiring Elaine Honeycutt and Charles and Jeanette Pegram--occurred more than six months before the filing of the unfair labor practice charge, the Company challenged the timeliness of the Board's Complaint. At the start of the hearing, the Company moved to exclude all testimony regarding promulgation of the antinepotism policy and evidence on hiring decisions made by the Company outside of the limitations period. Counsel for General Counsel argued that the antinepotism rule was discriminatorily instituted and that the Company discriminated against the alleged discriminatees by refusing to rehire them outside of the limitations period even before the institution of the antinepotism rule. Counsel further stated that although no specific finding of a violation could result from the introduction of evidence outside the limitations period, the ALJ should admit the evidence as background. Overruling the Company's objection, the ALJ allowed Counsel for General Counsel to introduce as background evidence that the implementation of the antinepotism policy and hiring decisions made outside the limitations period were illegal. The ALJ

qualified his ruling stating although such evidence was admissible, he would not predicate a finding of an unfair labor practice within the six-month limitations period on such background evidence.

The Board found that issuance of the Complaint was not barred by the running of the six-month limitations period. In the Board's view, the Company's § 10(b) "procedural" defense and reliance upon *Local Lodge No. 1424, International Association of Machinists (Bryan Manufacturing Co.) v. NLRB*, 362 U.S. 411 (1960), was misplaced. The Board held that § 10(b) is subject to equitable tolling and that the six-month limitations period did not begin to run until Honeycutt and the Pegrams were put on actual or constructive notice they were not eligible for rehire. The Board found it was not until June and October, 1983, dates within the limitations period, that Honeycutt and the Pegrams were told they would not be rehired because of the antinepotism policy. Consequently, the Board held the Union's charge was timely.

The Court of Appeals found the charge was timely filed and enforced the Board's Order. Neither the Board nor the Court of Appeals addressed the Company's arguments, advanced pursuant to *Bryan Manufacturing*'s two-situation test, that the ALJ erred as a matter of law in allowing Counsel for General Counsel to introduce pre-§ 10(b) evidence that the antinepotism policy was unlawfully implemented and then in relying on the time-barred evidence to prove an illegal refusal to rehire within the limitations period.

IV. The Board's Ultimate Findings as to the Merits of the Unfair Labor Practices Alleged

On the merits, the Board found the critical issue raised by the refusal to rehire allegation was "whether the return to the [antinepotism] rule or policy was prompted by Respondent's desire to avoid rehiring union supporters." It observed that, according to the dictates of *Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), the General Counsel established a *prima facie* case that the union activity of Elaine Honeycutt and Charles and Jeanette Pegram was a motivating factor in the Company's refusal to rehire them. Accordingly, the Board concluded the burden shifted to the Company to demonstrate that it would not have rehired the three alleged discriminatees even in the absence of their protected conduct.

The Board first examined whether the Company's antinepotism policy was discriminatorily implemented inasmuch as the policy was the sole basis for refusing to rehire Honeycutt and the Pegrams within the limitations period. While initially concluding the Company's antinepotism policy was based upon "some very obvious and legitimate purposes," the Board concluded it was discriminatorily implemented in late February 1983. Thus, finding illegality in the February 1983 promulgation of the antinepotism policy even though outside of the § 10 (b) period, the Board concluded the Company violated §§ 8(a)(3) and (4) of the Act by enforcing the policy against Elaine Honeycutt and Charles and Jeanette Pegram when they updated their applications each month within the limitations period or since April 20, 1983.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals, erroneously and in conflict with this Court's decisions, decided an important § 10(b) question of law that significantly affects the administration of the Act.

1. The decision below conflicts with this Court's holding in *Bryan Manufacturing*. In *Bryan Manufacturing*, a union committed an unfair labor practice by entering into a collective bargaining agreement containing a union security clause when it did not represent a majority of the employees in the appropriate unit. Ten to twelve months after the execution of the agreement charges were filed with the Board. The Board contended that the execution and continued enforcement of the bargaining agreement constituted independent unfair labor practices. The Board, while conceding that § 10(b) barred any complaint based upon the execution of the alleged illegal agreement, contended that evidence as to the execution was admissible and relevant as background to determine whether conduct within the limitations period was unlawful. This Court disagreed holding that the General Counsel's complaint was time-barred. This Court held that continued enforcement of the contract was not an unfair labor practice without reference to the unlawful execution that occurred more than six months prior to the filing of the charge. This Court also rejected the Board's position that § 10(b) is a statute of limitations and not a rule of

evidence and fashioned a two-situation test to determine the admissibility of events outside the limitations period as bearing upon alleged violations within the limitations period:

> The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose, § 10(b) ordinarily does not bar such evidentiary use of anterior events. [Footnote omitted.] The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There, the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

Id. at 416–417.

The facts of this case fall squarely within *Bryan Manufacturing's* second situation. The controlling time-event in this case is the Company's implementation of the antinepotism policy in February 1983, two months

outside of § 10(b)'s limitations period. This time-barred event is the entire foundation for the refusals to rehire that occurred within the limitations period. Absent that fact, the Company's enforcement of a facially neutral and otherwise valid antinepotism policy was wholly legal, for the Board never concluded the policy itself was discriminatory, only that it was promulgated for unlawful reasons. Nevertheless, the Board relied upon its conclusion that the antinepotism policy was illegally implemented not as mere background, but as the sole evidence upon which it found a refusal to rehire violation within the limitations period.[8] The time-barred event was given exclusive significance by the Board since an unfair labor practice based upon the Company's refusal to hire could not be made out within the limitations period except by reliance on the policy's original unlawful promulgation. Even assuming the Board correctly found the antinepotism rule was unlawfully promulgated, the finding has no legal effect because the rule was promulgated outside the § 10(b) period. Moreover, all the evidence showed it was applied neutrally within the § 10(b) period. Thus, the policies underlying § 10(b) and the rule of evidence established by this Court in *Bryan Manufacturing* have been violated by the Board's reviving a defunct unfair labor practice and converting an otherwise legal refusal to rehire into something illegal.

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[8] In fact, at the beginning of his analysis on the merits of the unfair labor practice allegations, the ALJ clearly indicated his intent to rely on time-barred evidence to find a violation within the period when he stated, "The issue here is whether the return to the rule or policy was prompted by Respondent's desire to avoid rehiring of union supporters."

2. The Board's decision the Company illegally refused to rehire the alleged discriminatees within the limitations period pursuant to an illegally promulgated antinepotism policy in effect holds that the Company's continued enforcement of the antinepotism policy was a continuing violation, a result proscribed by this Court's decisions. The Board concluded the Company's sole basis for refusing to rehire the alleged discriminatees was because they were relatives of management and not eligible for rehire under the antinepotism policy. In this context, the three were refused reemployment each month they updated their applications. The Board's holding in effect invokes a doctrine of continuing violation. As this Court stated in *Bryan Manufacturing*, even though the Board's ruling did not rest on a formal finding that the execution of the policy amounted to an unfair labor practice, were that not in fact the case, enforcement of the policy would carry no taint of illegality. Thus, the Board's vice herein is the "particular use of the pre-limitations facts" at which § 10(b) is aimed to find a continuing violation within the limitations period contrary to this Court's holding in *Bryan Manufacturing*.

The effect of the Board's holding in this case creates an erroneous precedent and conflicts with this Court's holdings in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977), which rejected claims of continuing violations. In both cases, complainants advanced a claim, similar to the allegations advanced herein, that time-barred illegal conduct and its effects caused them harm within the limitations period. The reasoning in *United Airlines* is particularly applicable to this case. There, this Court found that United's seniority system, though giving some present

effect to a past act of discrimination, was neutral in its operation. Finding United was entitled to treat its past act as lawful after complainant failed to pursue a claim within the limitations period, this Court reasoned as follows:

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

Id. at 558.

The Board found the Company's reimplementation of the antinepotism policy outside the § 10(b) period was discriminatory, then proceeded to rely on this finding to support its conclusion that, within the § 10(b) period, the Company illegally refused to rehire Honeycutt and the Pegrams pursuant to the policy. The Board's giving legal significance to the reimplementation of the policy, a time-barred event, directly contravenes this Court's dictate in *United Airlines* that such an event is "merely an unfortunate event in history which has no legal consequences." The Board's decision and the Court of Appeals' affirmation of the Board's decision thus directly conflict with a prior decision of this Court.

3. The Company concedes it did not specifically inform Honeycutt and the Pegrams until within the limitations period that their applications were being

rejected each month they reapplied due to the antinepotism policy. The Board, however, never accurately focused on the actual "unlawful employment practice" charged in the Complaint as required by *Delaware State College v. Ricks*, 449 U.S. at 257. The original unfair labor practice charge filed by the Union, *not* by the alleged discriminatees, charged the Company with "refusing to recall from layoff or to rehire" Elaine Honeycutt and Charles and Jeanette Pegram. The Board's Complaint alleged the Company's unlawful employment practice was a refusal to rehire. At trial, Counsel for General Counsel stated she intended to prove the Company discriminated against the three applicants in January and February 1983 (outside the limitations period and *prior to* the institution of the antinepotism rule) when they were passed over for job openings in their former classifications. In its Brief to the Court of Appeals, the Board argued that "Substantial evidence supports the Board's finding that the Company retaliated against this known protected activity by refusing to rehire the three when positions first became available for which they were qualified." Much of the testimony in this case was offered by Counsel for General Counsel to prove the Company discriminated against the three applicants prior to the institution of the antinepotism rule and outside the limitations period. Counsel for General Counsel was allowed to admit evidence, including a list of Company hires back to 1982, to prove her stated position there was discrimination which preceded the § 10(b) period. The Company spent a substantial portion of the trial and in its brief to the ALJ defending against that

allegation.[9] All parties to this case agree that the three alleged discriminatees applied for rehire each month outside the limitations period, but were not rehired into jobs for which they were otherwise qualified, arguably an unfair labor practice within the plain meaning of the "refuse to rehire" Complaint allegation. In sum, these facts show that the initial "unlawful employment practice"--the refusal to rehire as alleged in the Complaint--occurred in January and February 1983 outside of the limitations period. Therefore, either the three were arguably discriminated against outside of the limitations period by an illegal refusal to rehire as alleged in the Union's charge, the Board's Complaint, by Counsel for General Counsel, and the Board, or they were not. If they were, then the charge alleging a refusal to rehire was untimely, and the Complaint should have been dismissed.

II.

This is an important case concerning equitable tolling issues this Court should resolve to promote proper administration and enforcement of § 10(b) of the Act.

The Act's limitations period in § 10(b) is subject to equitable tolling as are virtually as statutes of limitations. As a general rule, federal statutes of limitations begin to run "when the claimant discovers, or in the exercise of reasonable diligence should have discovered the acts constituting the alleged violation." *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 382 (9th Cir. 1979). Courts construing Title VII's limitations period have held

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[9] Approximately 30 percent of the record testimony was devoted to pre-§ 10(b) allegations.

that in a refusal to hire context filing periods begin to run when facts supportive of a charge are or should be apparent to a reasonably prudent person similarly situated or upon the happening of events which should have alerted the average lay person to act to protect his rights. *Nilsen v. City of Moss Point, Mississippi*, 621 F.2d 117, 121 (5th Cir. 1980).

Conceding none of the alleged discriminatees were told until within the limitations period they were barred from employment because of the antinepotism policy, the Company contends equitable tolling was not appropriate in this case for a number of compelling reasons. The Board did not find the Company fraudulently concealed the implementation or application of the antinepotism policy. Each month the three individuals reapplied, they were refused employment. They were specifically told there were no jobs available. The Company communicated to them a refusal to rehire each month they reapplied. Therefore, the three individuals could have filed an unfair labor practice charge to protect their interests each month the Company refused to rehire them. The record is clear they knew as early as January 1983 jobs for which they were qualified were given to other applicants. That is when they discovered or should have discovered the acts constituting the alleged violation, i.e. an illegal refusal to rehire. *See, Vallone v. Local Union No. 705, International Brotherhood of Teamsters*, 755 F.2d 520, 522 (7th Cir. 1985); *Klemens v. Air Line Pilots Association, Int'l*, 736 F.2d 491, 500 (9th Cir. 1984); *General Marine Transport Corp. v. NLRB*, 691 F.2d 180, 188–189 (2d Cir. 1980); *NLRB v. California School of Professional Psychology*, 583 F.2d 1099, 1101 (9th Cir. 1978); *NLRB v. Local 30, International Longshoremen's and Warehousemen's Union*, 549 F.2d 698,

701 (9th Cir. 1977); *Local 1104, Communications Workers v. NLRB*, 520 F.2d 411, 416 (2d Cir. 1975); *Nazareth Regional High School v. NLRB*, 459 F.2d 873, 882 (2d Cir. 1977).

Equitable tolling is not appropriate in this case because the discriminatees' agent, the Union, as charging party in this case, had actual knowledge the first alleged refusals to rehire occurred outside of § 10(b)'s six-month limitations period. The Union's first unfair labor practice charge filed on October 19, 1983, alleged that since January 25, 1983, the Company refused to rehire Jeanette Pegram and that since March 15, 1983, it refused to rehire Elaine Honeycutt and Charles Pegram. Obviously, both alleged illegal refusal to rehire dates are outside the limitations period. Significantly, the dates alleged by charging party prove it knew the first alleged illegal refusals to rehire occurred outside of the § 10(b) period. Why else would the charging party Union declare in writing pre-§ 10(b) dates if it did not believe the initial illegal refusals to rehire occurred then?[10] Subsequently, however, charging party must have realized the statute of limitations problem because it amended the charge on the same day the Board issued its Complaint to allege the refusals to rehire occurred on April 20, 1983, coincidentally one day within the six-month period from October 19. April 20, 1983, has no factual significance other than it is exactly six months prior to October 19.

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[10] The charge form signed by the Union states "[T]he statements therein are true to the best of my knowledge and belief," and false statements on the charge can be punished by fine and imprisonment.

Hence, charging party's own documents conclusively establish it had actual knowledge the unlawful refusal to rehire occurred outside of the limitations period. This knowledge should be imputed to the discriminatees. Charging party's expedient charge amendment is nothing more than a subterfuge to mask its actual knowledge that the initial illegal refusals to rehire occurred outside § 10(b) and should not defeat the limitations period's application to bar issuance of the Complaint.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of April, one thousand nine hundred and eighty-six.

Present:

HONORABLE WALTER R. MANSFIELD

HONORABLE RICHARD J. CARDAMONE

HONORABLE LAWRENCE W. PIERCE

Circuit Judges

UNIGLASS INDUSTRIES, A DIVISION OF UNITED MERCHANTS & MANUFACTURERS, INC.,

Petitioner-Cross-Respondent,

-against-

O R D E R
Docket No.
85-4182(L)
85-4188

THE NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

Uniglass Industries, a Division of United Merchants & Manufacturers, Inc. (Uniglass), brought this action

pursuant to § 10(f) of the National Labor Relations Act (Act), 29 U.S.C. § 160 (1982), to set aside a September 24, 1985 Order of the National Labor Relations Board (Board) finding that Uniglass had committed unfair labor practices in violation of §§ 8(a) (1), (3) and (4). 29 U.S.C. § 158(a)(1), (3), and (4). The Board affirmed the Administrative Law Judge's (ALJ) findings. It has filed a cross-application for enforcement of its Order.

Uniglass operates a plant in Statesville, North Carolina where it manufactures synthetic fibers. The Amalgamated Clothing & Textile Workers Union (Union) commenced an organizational campaign at Uniglass in early 1980. This culminated in an election on July 24, 1980, which the Union lost. Employees Elaine Honeycutt, Charles Pegram, Jeanette Pegram, and Jeffrey Smith engaged in union activity at the Uniglass plant in 1980. In early 1981 the Board conducted a hearing on unfair labor practice charges arising out of the organizational campaign. Elaine Honeycutt and Charles Pegram testified at the hearing as witnesses for the Union. Between January and July 1982 Uniglass laid off the Pegrams and Elaine Honeycutt, and the employees were terminated pursuant to company policy after their layoffs. Jeffrey Smith was notified on June 15, 1983 to meet with his department head to explain recent absences. Honeycutt came to the meeting to verify Smith's illness. Smith's employment subsequently was terminated.

The Board found that Uniglass violated § 8(a)(3), (1) of the Act by refusing to rehire the Pegrams and Honeycutt, in retaliation for their protected union activities and by discharging Smith, in retaliation for association with a union supporter. The Board also found that Uniglass violated §§ 8(a)(4), (1) by refusing to rehire Honeycutt and Charles Pegram in retaliation for their

testimony at a Board hearing. Finally, the Board concluded that Uniglass violated § 8(a)(1) by informing an employee, Arlene Smith, that Jeffrey Smith would not have been discharged had he not sought Honeycutt's assistance, and by informing Honeycutt that she would not have been laid off and would have been rehired but for her involvement in Union activities.

First, we reject Uniglass' argument that the Board's finding of unlawful refusal to rehire is time-barred by the six-month limitation of § 10(b) of the Act, 29 U.S.C. § 160(b). Under the Act, the six-month limitation period "does not begin to run until the aggrieved party knew or should have known that his statutory rights were violated." *Metromedia, Inc. v. NLRB*, 532 F.2d 1182, 1189 (8th Cir. 1978); *accord NLRB v. Don Burgess Const. Corp.*, 596 F.2d 378, 382-83 (9th Cir. 1979); *Wis. River Val. Dist. Council, Etc. v. NLRB*, 532 F.2d 47, 53 (7th Cir. 1976). Here, Uniglass failed to show that Honeycutt or the Pegrams had actual or constructive knowledge outside the six-month period that they were barred from reemployment. The Board found that Honeycutt did not discover that she was not subject to rehire until June 1983, when she inquired of Assistant Industrial Relations Manager Carl Sharpe why she had not been rehired. The Pegrams learned that they would not be rehired on October 12, 1983, when they also were notified by Carl Sharpe. On October 19, 1983 the union filed its charge alleging a discriminatory refusal to hire. The fact that other individuals were being hired for positions these employees had previously held did not serve to put them on notice that they would never be hired.

Finally, substantial evidence on the record as a whole supports the Board's findings that Uniglass violated §§ 8(a)(3), (1), and in two instances 8(a)(4) of the Act by

refusing to rehire Honeycutt, and the Pegrams because of their protected union activities and by discharging employee Jeffrey Smith because of his association with Honeycutt. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Uniglass' petition for review is denied and enforcement of the Board's order is granted.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Walter R. Mansfield, U.S.C.J.

Richard J. Caradmone, U.S.C.J.

Lawrence. W. Pierce, U.S.C.J.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNIGLASS INDUSTRIES, DIV. UNITED MERCHANTS & MFRS.

and Case 11--CA--11089

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL--CIO, CLC

DECISION AND ORDER

On 3 August 1984 Administrative Law Judge Hutton S. Brandon issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect, *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Uniglass Industries, Div. United Merchants & Mfrs., Statesville, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. 24 September 1985

Donald L. Dotson, Chairman

Patricia Diaz Dennis, Member

Wilford W. Johansen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

UNIGLASS INDUSTRIES, DIV. UNITED MERCHANTS & MFRS.

and Case 11—CA—11089

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL—CIO, CLC

Janet M. Holland, Esq., for the General Counsel.

David C. Hagaman, Esq., (Clark, Paul, Hoover & Mallard), of Atlanta, GA, for the Respondent.

Mr. Robert E. Freeman, of Kannapolis, NC, for the Charging Party.

DECISION

Statement of Case

HUTTON S. BRANDON, Administrative Law Judge. This case was tried at Statesville, North Carolina, April 24–26, 1984. The charge was filed on October 19, 1983,[1] by Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC, herein called the Union, and

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[1] All dates are in 1983 unless otherwise specified.

amended on December 2. The complaint and an amended complaint in the case issued on December 2 and 13, respectively. The complaint, as amended, alleges that Uniglass Industries, Div. United Merchants & Mfrs. also, herein called Respondent or the Company, violated Section 8(a)(1),(3), and (4) of the National Labor Relations Act, herein called the Act. The primary issues are whether Respondent, (a) violated Section 8(a)(3) and (1) of the Act in discharging its employee Jeffrey Smith because of his involvement in union or concerted activities, (b) violated Section 8(a)(4),(3), and (1) of the Act by refusing to rehire Elaine Honeycutt, Charles Pegram, and Jeanette Pegram because of their union activities and/or because they gave testimony under the Act in a prior proceeding before the Board involving Respondent, and (c) independently violated Section 8(a)(1) of the Act through statements of two supervisors to employees to the effect that the alleged discriminatees were discharged or were not rehired because of their involvement in union activities or activities otherwise protected under the Act.

On the entire record, including my observation of the demeanor of the witnesses and after consideration of the oral argument at the hearing by the Union and the post hearing briefs filed by the General Counsel and Respondent, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is a corporation operating a plant in Statesville, North Carolina, where it is engaged in the manufacture of synthetic fibers. During the 12-month period preceding issuance of complaint, Respondent, at its Statesville plant, received goods and raw materials valued

in excess of $50,000 directly from outside the State of North Carolina. During the same period, Respondent manufactured, sold, and shipped goods valued in excess of $50,000 from its Statesville plant directly to points outside the State of North Carolina. On these admitted facts, the complaint alleges, Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The complaint also alleges, Respondent admits, and I further find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. Background

The union activity alleged to provide the impetus for Respondent's actions in the refusals to rehire and the discharge in this case began among Respondent's employees sometime in early 1980. All of the alleged discriminatees herein testified to various activities in behalf of the Union, and Respondent through Carl Sharpe, its assistant director of industrial relations, admitted to knowledge of the Union inclinations and sympathies of Honeycutt and Charles Pegram. Moreover, both Honeycutt and Charles Pegram had given testimony against Respondent in a prior unfair labor practice hearing before the Board in early 1981. That case was settled by the parties during the hearing and prior to any decision on the issues involved.

Respondent's knowledge of Jeanette Pegram's union inclinations could be inferred from the fact that she was married to Charles Pegram and likely shared his views on

the Union. However, such an inference is unnecessary because Rayford Clanton, Jeanette's brother and a department manager and supervisor for Respondent, admitted to remarks related in more detail below revealing Respondent's knowledge that Jeanette in fact shared in her husband's union support.

Jeffrey Smith testified that he was active in the union campaign to the extent of passing out union leaflets, attending meetings, and wearing a union T-shirt in the plant. Respondent does not admit to any knowledge of Smith's union activity which in any event would have antedated his most recent period of employment by Respondent beginning on March 14. However, as detailed infra, the General Counsel primarily relies upon Smith's involvement with known union adherent Honeycutt to supply the basis for Respondent's knowledge of his likely union support and the predicate for retaliatory action against him.

The record indicates that the Union's campaign culminated in an election on July 24, 1980, and the Union lost. The record does not establish that the old union campaign was continuing during the period when Respondent took the alleged discriminatory action herein or that a new campaign had started at any relevant time.

B. The Refusals To Rehire

1. The material facts

a. Honeycutt

Elaine Honeycutt's first period of employment by Respondent began in about 1973. On three separate occasions she quit. Her fourth and last period of

employment began in September 1978. At the time of her layoff in July 1982, she was a weaver. Neither the layoff nor Honeycutt's selection for layoff was discriminatory.

Under Respondent's policies in effect at the time of Honeycutt's layoff laid off employees retained recall rights for a period of 6 months.[2] Under this policy, Honeycutt's recall rights expired in January, and it then became necessary for her to reapply for employment with Respondent. She did so in January. Moreover, as required under Respondent's policies, Honeycutt "updated" her application monthly by advising Respondent's offices of her continued interest in employment. Honeycutt testified herein that upon visits or calls to Respondent to update her application she was told by Judy Lamberth, then Respondent's assistant personnel manager, to rest assured that when a job became available for which she was qualified she would be called.

Honeycutt was not recalled to work, however, in spite of the undisputed fact that beginning in February, Respondent began to hire new employees including six in Honeycutt's weaver classification. Additional weavers were hired in March. Further, seven new employees were

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[2] Respondent changed this policy July 1983, to extend recall rights for a full year.

hired in February in the loom fixer classification, a position in which Honeycutt had received 13 weeks of training in 1980.[3]

Honeycutt testified that after becoming aware that Respondent had employed a large number of employees she arranged a meeting with Sharpe in June. At the meeting she asked Sharpe why she had not been recalled. Sharpe replied that it was because Respondent had decided to enforce a previously existing policy against hiring applicants with relatives in Respondent's management or supervision.[4] It is undisputed that Honeycutt's father, George Honeycutt, was at all material times employed by Respondent in a position qualifying him as supervisor within the meaning of the Act. Honeycutt asked Sharpe why Randy Gardner, a son of a weave room supervisor, had been hired in February, and Sharpe indicated that the return to the old policy did not take effect until March 1.[5]

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[3] Honeycutt conceded that it takes approximately 26 weeks of training to become proficient in loom fixing. She was bumped back from the position prior to completion of her training due to an economic layoff.

[4] The policy, appearing in the Employee Handbook generally distributed to employees, is as follows:

> To avoid misunderstandings, no member of management shall employ and/or supervise any member of his or her immediate family. The immediate family is defined as a parent, brother, sister, spouse, child, grandparent or corresponding in-laws. (This policy does not affect any situations existing when this policy was established.)

[5] When it was decided that the old policy would be enforced, relatives of management who were already employed were "grandfathered" in and not discharged.

The remarks attributed to George Honeycutt by his daughter mark the development of a deep familial rift caused by Elaine Honeycutt's union support. Thus, she testified that prior to her testimony in the earlier Board proceeding her father asked her not to testify, told her he'd rather she stay out of the matter, and told her if she testified she would lose her job and would have to leave the State to find another one. The day following her testimony, he told her that she had disgraced him, that Respondent was going to close its doors, that neither he, Elaine, nor her sister Wanda, also an employee of Respondent who worked against the Union, would have a job. According to Honeycutt, her father repeated these remarks and made similar remarks on several subsequent occasions. More specifically, about 3 weeks following her layoff, he told her after what she had done and the shame she had put on him Respondent would never recall her to work. He further told her that if she hadn't "run" her mouth and had not testified, she would still have been working at Respondent, that her actions had put a black mark on his name, that she wasn't worth much, and probably wouldn't get another job in town.

The General Counsel contends that Respondent's failure to rehire Honeycutt during February when it rehired other employees and Respondent's subsequent decision to enforce its "anti-nepotism" policy were discriminatory actions designed to avoid reemployment of Honeycutt. This contention is supported by further uncontradicted testimony of Honeycutt concerning conversations with herfather about the union campaign and Honeycutt's efforts to be reemployed.

The last remark on this subject attributed by Honeycutt to her father was made in a telephonic conversation between the two a month or two prior to the

hearing herein. Upon her question as to whether she would be recalled by Respondent, George Honeycutt ambiguously replied that he didn't think she would be called back, not because of the Company but because of the Union.

Further evidence of Respondent's animosity toward Honeycutt due to her union activity was revealed in the testimony of employee Arlene Smith. She testified about a conversation she had with Raymond White, Respondent's weave division manager, around June 28, regarding the discharge of Jeffrey Smith, another alleged discriminatee and Arlene's son. According to Mrs. Smith, White reported to her at her work station concerning his post discharge efforts in behalf of Jeffrey Smith undertaken at Jeffrey Smith's request. White told here there was nothing he could do about the discharge but if he had known about it before it happened, he could have stopped it. However, he added that "they were saying" that Jeffrey made an implied threat to Respondent when he brought Honeycutt with him when he came to see his supervisors just prior to the discharge. Mrs. Smith replied that the only purpose for Honeycutt's presence was verification of Jeffrey Smith's illness which occasioned the absences which in turn precipitated Smith's discharge interview. Mrs. Smith, Jeffrey's mother, added that her son had initially asked her to come and verify his illness to his supervisors rather than Honeycutt but she had declined, and Honeycutt who lived with the Smiths volunteered. White replied that had Mrs. Smith come or had Jeffrey come alone he would still be employed. White added that if one had an argument one would not go out and get one's worst enemy to arbitrate. Mrs. Smith asked White if Honeycutt was his worst enemy and White answered, "The way she dragged our ass through court[7]," and the conversation ended.

Arlene Smith testified regarding two additional conversations she had with White concerning Honeycutt. The first was in January when she asked White if Honeycutt would be hired back. On that occasion, White said he thought a lot of Mrs. Smith,[6] and of Honeycutt's father, and he would do his best but he had a lot of opposition from "across the street," a reference to the personnel office. Subsequently in March, White reported to her that he and Wendell Cook, superintendent of weaving, had "tried" hard to get Honeycutt back but just weren't going to be able to do it.

Respondent's explanation for not recalling Honeycutt in early February, as related through Sharpe, was that Respondent hired other former employees in preference to Honeycutt since they had better work records. Specifically, in this regard, Sharpe testified that during her employment, Honeycutt had received 12 "talk sheets" and 4 written reprimands while the others rehired did not have disciplinary records as bad as Honeycutt. Sharpe's explanation for the subsequent failure to recall Honeycutt was based on Respondent's decision to reinforce its "anti-nepotism" policy. In this regard, Sharpe testified that his attention was called to the "anti-nepotism" policy, or more specifically, the failure to enforce it, when supervisor Doug Gentle requested him in February to hire Gentle's son. Sharpe, then the personnel manager, resisted but learned that Randy Gardner, son of a department manager in weaving, had just been hired. He concluded that it was time to correct the problem by

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[6] It appears to have been common knowledge that Honeycutt lived in Mrs. Smith's home. Further, Honeycutt identified Mrs. Smith as being the grandmother of Honeycutt's daughter.

enforcing the existent policy. Accordingly, after conferring with Bob Rogers, Respondent's general manager, the decision was made to enforce the anti-nepotism policy, and the decision was communicated to Bob Foster, employee relations director, and Lamberth. Sharpe confirmed the determination to enforce the policy with a memo to Rogers dated March 1. He testified that since reinstitution of the policy, Respondent has made no exceptions in its application and pointed out that in addition to Honeycutt, Respondent has, since March 1, declined to hire six relatives of management officials including the son of Doug Gentle.

Sharpe admitted talking to Honeycutt about the decision not to rehire her because of reinstitution of the anti-nepotism policy. However, he placed their conversation in late March or early April rather than June as Honeycutt had testified.

White, called as a witness by Respondent, acknowledged that he talked to Arlene Smith about Jeffrey Smith's discharge. He generally denied the remarks attributed to him by her on that occasion and conceded only that he told her that if she had come to see him before the events had taken place he possibly could have helped Jeffrey.

b. Charles and Jeanette Pegram

Charles Pegram was employed by Respondent for approximately 20 years. He worked as a loom cleaner prior to his layoff about March 15, 1982. His wife, Jeanette Pegram, was also a long time employee of Respondent having started work there in 1964. Like Charles, Jeanette, a banker in the preparation department, had prior layoffs, one lasting from September 1976 to

November 1979. Her last period of employment ended with her layoff on January 25, 1982.

Under Respondent's policy already noted, the Pegrams lost seniority and recall rights 6 months following their layoffs. However, they put in new applications and monthly thereafter updated their applications by visits to the plant personnel office. They were never rehired although Respondent, beginning in late January and continuing over the next several months, rehired a number of loom cleaners and bankers. Moveover, it is undisputed that the Pegrams were never told by Respondent they were not going to be rehired or the reason they were not until October 12, when Sharpe observed them during their visit to the plant to "update" their applications and called them to his office. There he explained to them, in effect, that they were wasting their time, that they would not be rehired because Respondent had on March 1, reinstituted its policy against hiring close relatives of supervisors or management. It is undisputed that Jeanette Pegram's brothers Rayford and Buford Clanton were employed by Respondent as supervisors at all material times.

Respondent, through Sharpe, conceded at the hearing that the Pegrams had good work records and contended that the refusal to recall them was based solely upon the decision to enforce the anti-nepotism policy. Sharpe in his further testimony explained the failure to rehire the Pegrams during the period between the beginning of Respondent's rehiring of employees in the Pegrams' work classifications and the date of the reinstitution of the anti-nepotism policy. Thus, with respect to the one banker, Elizabeth Steelman, rehired during that period, Sharpe testified that Steelman was selected over Jeanette Pegram because of her need for work and her advanced age. Further according to Sharpe, while the work records

of the two were about equal, Jeanette Pegram presented a slightly greater safety risk in view of a back injury which had caused her to lose work time during her previous employment.

With respect to Charles Pegram, Sharpe testified that one vacancy in the loom cleaner classification was filled on the third shift around February 20, and another on the second shift sometime later but after the decision had been made to reinstitute the anti-nepotism policy. Charles Pegram was not considered for the first vacancy because he had asked for employment on the second shift (a fact he admits), and he was ineligible for the second shift position when it was filled due to the anti-nepotism policy and his relationship to supervisors Rayford and Buford Clanton.

To support her contention that the refusal to rehire the Pegrams was based upon unlawful union considerations, the General counsel relies upon the testimony of Jeanette Pegram and Ralph Clanton, another of Jeanette's brothers. Ralph Clanton testified about two telephone conversations he had with Rayford Clanton on September 18, during a visit to the Pegram home.[7] He called to inquire when that "hole" was going to rehire the Pegrams. Rayford Clanton took offense at the reference to Respondent which he perceived to be uncomplimentary, and the conversation between the two brothers went downhill from that point. More specifically, Ralph Clanton testified that Rayford explained that the Pegrams had no recall rights and

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[7] Ralph Clanton initially testified to only one telephone conversation with Rayford but on cross-examination explained that Rayford hung up on him at one point but called him back within a minute or two.

rejected a suggestion that he could do anything about getting them rehired saying that it was up to the personnel department. Rayford also added that had the Pegrams "not shown their asses by trying to organize that stupid union, they might still have been" employed by Respondent. The brothers concluded their conversations but not before exchanging uncomplimentary remarks and discussing a meeting for the purpose of fighting.

Jeanette Pegram attributed a similar remark to Rayford Clanton about October 12 after being told by Sharpe she and Charles would not be rehired. She telephoned Rayford and asked him what he had meant in the remark to Ralph Clanton about having showed "our ass." Rayford replied that it was on account of their taking part in the damn Union and added that if they had not showed their asses they would have been back to work "by now."

Rayford Clanton in testifying for Respondent admitted that he had told Ralph that the Pegrams had showed their asses by being involved with the Union. However, he related that it was Ralph who asked if Rayford was saying that the Pegrams would still have been employed if it had not been for their union involvement. To this, Rayford responded that he had not said that. Rayford Clanton did not in his testimony respond to the remarks attributed to him by Jeanette Pegram, and thus did not contradict them.

While admitting to having an interest in seeing the Pegrams return to work, Ralph Clanton had the appearance of a dispassionate witness. He impressed me as being totally unaffected, very straightforward, and guilelessly honest. Moreover, I find it plausible and believable that Rayford Clanton, having expressly admitted to his dissatisfaction with the Pegrams' union involvement,

would in a heated discussion have attributed their lack of employment status to such involvement. Finally, Ralph's testimony is more probably accurate in view of Jeanette Pegram's uncontradicted testimony attributing an identical remark to Rayford Clanton. I, therefore, credit Ralph Clanton's testimony as well as that of Jeanette Pegram over that of Rayford Clanton who I found less persuasive as a witness.

2. Arguments and conclusions

Initially, the General Counsel argues that Rayford Clanton's statement to Jeanette Pegram was coercive and violative of Section 8(a)(1) because it conveyed to an employee applicant that Respondent would not rehire her because she had engaged in union activities. Further, the General Counsel contends that White's statement to Arlene Smith similarly violated Section 8(a)(1) of the Act because it implicitedly and coercively threatened an employee that employees were subject to discharge if they sought assistance of other employees or individuals who were, or had been engaged in union activity. Respondent's arguments in defense of the allegations are predicated solely on the testimony of its witnesses Rayford Clanton and Raymond White.

The testimony of Rayford Clanton has already been rejected herein where it contradicts the testimony of Ralph Clanton and Jeanette Pegram. I likewise reject the testimony of White where it differs from that of Arlene Smith. Arlene Smith's recollection appeared reasonably good and her delivery was convincing, and, I am persuaded, truthful. Furthermore, her version was reasonable for it is undisputed that White had admittedly agreed with Jeffrey Smith that he would inquire into Jeffrey's discharge and report to Mrs. Smith. Lastly, as

the General Counsel's brief points out, Mrs. Smith, as a current employee of Respondent, was testifying at some risk to her pecuniary interest so that her testimony was more likely to be true. *Gold Standard Enterprises, Inc.*, 234 NLRB 618,619(1978). I have considered, however, the possibility of bias on the part of Mrs. Smith based upon her relationship with Jeffrey Smith. However, I have discounted such bias, since it appears that as a long time employee of Respondent she had more to lose than gain by false testimony. White's testimony in contrast to Mrs. Smith was more equivocal and his recall less specific and certain. Accordingly, I credit Mrs. Smith where her testimony differs from that of White.

Considering the credited testimony of Ralph Clanton, Jeanette Pegram, and Arlene Smith, I concur in the arguments of the General Counsel that the remarks of Rayford Clanton and White tended to be coercive and conclude that Respondent violated Section 8(a)(1) of the Act as alleged through such remarks.

With respect to the unlawful refusal to hire the Pegrams and Honeycutt, the General Counsel contends that the reimplementation of the anti-nepotism policy was simply a pretext hit upon as a device to avoid the rehire of union adherents in violation of Section 8(a)(3) and (1). Thus, Respondent had not enforced the rule for many years, and even though during much of that time Sharpe had served as the plant personnel manager he had not found the failure to enforce the rule to be a substantial problem. Even when the rule was reimplemented, current employees were "grandfathered in" without causing any apparent difficulty. The General Counsel further argues that Respondent's witnesses cannot be believed regarding the date the anti-nepotism rule was reimplemented and suggests that the date of reimplementation of March 1 was

fabricated because Sharpe's March 1 memo refers to the application of Scott Gentle as a motivating factor for the action even though Gentle's application was not submitted until March 1. Further in this regard, the General Counsel points to the fact that neither the Pegrams nor Honeycutt were advised of the reimplementation until months after the claimed reimplementation date. Lastly, and specifically with respect to Charles Pegram, the General Counsel asserts that a loom cleaner was hired on February 28, before the rule was implemented. The rule could not, therefore, have been a factor in the refusal to rehire Charles Pegram according to the General counsel. Yet, clearly it was the only factor relied upon by Respondent in not rehiring him.

The General Counsel argues that White's statement to Arlene Smith clearly establishes the 8(a)(4) violation with respect to the Pegrams and Honeycutt because it reveals Respondent's animosity toward Honeycutt for dragging Respondent through the court. Such animosity may also be inferred for Charles Pegram who likewise testified against Respondent in a prior case.[8]

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[8] The complaint alleged, and the General Counsel asserted, that the refusal to rehire Jeanette Pegram was also violative of Section 8(a)(4). However, the General Counsel appears to have abandoned this position in her brief. According, and since Jeanette Pegram did not previously testify against Respondent or, insofar as the record shows, give any information or affidavit to the Board in relation to the prior case, and because no authority or reasonable theory has been advanced upon which an 8(a)(4) violation by Respondent with respect to Jeanette Pegram can be predicated, I shall recommend that this allegation of the complaint be dismissed.

Respondent's initial defense to the refusals to rehire Honeycutt and the Pegrams is a procedural one. In its brief and in argument at the hearing, Respondent relied upon *Local Lodge 1424, Machinist (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960), contending that any finding of a violation in the refusals to rehire Honeycutt and the Pegrams is barred by the 6-month period of limitation set forth in Section 10(b) of the Act. More specifically, Respondent argues that the refusal to hire Honeycutt and the Pegrams can be found to be unfair labor practices only if the pre 10(b) decision to reimplement the anti-nepotism policy is found to be discriminatorily motivated. Respondent asserts that under *Bryan*, surpa, "where a complaint based on that earlier event [the decision to implement the anti-nepotism policy] is time barred, to permit the event itself to be so used [as evidence to cloak with illegality that which is otherwise lawful] in effect results in reviving a legally defunct unfair labor practice." In making this argument, Respondent fails to distinguish the substantial body of Board law, however, which holds that Section 10(b) is subject to equity principles so that it may be tolled where a Respondent has fraudulently concealed unlawful conduct and the person adversely affected by Respondent's actions is not put on notice of such action. See, e.g. *Jackson Engineering Co.*, 265 NLRB 1688 (1982); *Drukker Communications, Inc.*, 258 NLRB 734 (1981); *K & E Bus Lines, Inc.*, 255 NLRB 1022 (1981); *Crown Cork & Seal Company, Inc.*, 255 NLRB 14 (1981); *V M Construction Co., Inc.*, 241 NLRB 584 (1979); *Safety Electric Corporation.*, 239 NLRB 40 (1978).

On the basis of the cited cases the further authority cited in Respondent's brief, *NLRB v. McCready and Sons, Inc.*, 482 F.2d 872 (6th Cir. 1973), and *Bowen Products Corporation*, 113 NLRB 731 (1955), is inapposite, for in Respondent cases, the adversely affected parties had clear

notice of the alleged unlawful actions more than 6 months before the filing of the charge with the Board.

In the instant case, the 6-month period of limitations prior to filing the charge, I conclude, runs from the time that Honeycutt and the Pegrams were put on notice, actual or constructive, that they were not subject to rehire. Since the limitation period provided under Section 10(b) constitutes an affirmative defense, the burden of establishing the facts upon which the defense rests is upon the Respondent. *St. Mary's Home, Inc.*, 258 NLRB 1024 (1981). It is quite clear that the Pegrams were not told until October that they were not subject to rehire and the reason they were not, i.e., the reimplementation of the anti-nepotism rule. The reason expressed for the refusal to rehire is less important than the communication that they would not be hired. The fact remains that prior to October they were not in anyway discouraged from "updating" their applications. Respondent points to no substantive evidence to establish actual or constructive knowledge on the Pegrams' part outside the 10(b) period that they would not be rehired. The fact that Respondent may not have actively concealed its reimplementation of the anti-nepotism policy does not constitute conveyance of a notice to the Pegrams of their ineligibility for rehire. See *AMCAR Div., AFC Industries, Inc.*, 234 NLRB 1063 (1978), enfd. as mod. 596 F.2d 1344 (8th Cir. 1979).

On the basis of this record until October, the Pegrams were entitled to believe that they were subject to being rehired and even that their probability of rehire was good, in light of their prior work record with Respondent which Respondent admits was good. Accordingly, I conclude that the Section 10(b) period did not begin to run with respect to the Pegrams until they were advised by Sharpe that they would not be rehired. Since that information was given

them on October 12 and the initial charge herein was filed on October 19, the charge was clearly timely under Section 10(b).

Whether Respondent's 10(b) defense is valid with respect to Honeycutt's case depends upon whether one believes Honeycutt or Respondent's witnesses, Sharpe and Judy Lamberth, the assistant personnel manager at the relevant time. Honeycutt testified it was in June that Sharpe told her she would not be rehired. If in fact Honeycutt received such notice any time in June, then the charge with respect to Honeycutt was timely under Section 10(b). However, Sharpe testified he told Honeycutt that she would not be rehired and the reason in late March or early April. Lamberth's testimony was that Sharpe told her in late March that he had advised Honeycutt that she would not be rehired. A March revelation of this information to Honeycutt would make the charge untimely in her case. Honeycutt's testimony on the time frame of her meeting with Sharpe on the subject of her rehire was unequivocal if not precise with respect to the exact date. Notwithstanding the importance of her testimony on this point, Respondent chose not to extensively question her on it during cross-examination. Moreover, her testimony generally was not substantially contradicted. Sharpe's testimony was no more precise than Honeycutt's on the date of their meeting. His uncertainty as to the date does not preclude the possibility that his discussion with Honeycutt tool place after April 21, the earliest date the charge would be timely under Section 10(b) with respect to Honeycutt's case. Lamberth also admitted uncertainty in her testimony placing the meeting between Honeycutt and Sharpe in March. Furthermore, Lamberth when pressed was unable to convincingly explain exactly why she recalled March was the month that Sharpe told her Honeycutt had been

told she would not be rehired. Under these circumstances and because Lamberth admitted that Honeycutt continued to "update her" application after March, and because there is no evidence that Honeycutt did so after June, I am convinced that Honeycutt's testimony as to the date should be credited. Accordingly, I conclude that Respondent has failed to affirmatively establish that Honeycutt had notice that Respondent definitely would not rehire her more than 6 months prior to the filing of the charge.

Turning to the merits of the complaint allegations regarding Honeycutt and the Pegrams, it must initially be observed that the General Counsel under the dictates of *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), must first prove a prima facie case sufficient to support the inference that protected conduct was a motivating factor in the Respondent's failure to rehire the three employees. Once a prima facie case is established, the burden then shifts to the employer to demonstrate the same action would have taken place even in the absence of protected conduct.

The General Counsel's prima facie case with respect to Honeycutt and the Pegrams is established, I conclude, by the statements I have found to have been made by Rayford Clanton and Raymond White. The uncontradicted statements of George Honeycutt to Elaine Honeycutt also support the General Counsel's case. Thus, the statements of Rayford Clanton, White, and George Honeycutt establish Respondent's knowledge of the union activities and inclinations of the three alleged discriminatees, Respondent's hostility to the three because of such activity and inclinations, and Respondent's determination not to rehire the three specifically due to that hostility. The other record evidence supporting the General Counsel's case is found in the uncontradicted fact that the three were not

rehired for positions in which they were qualified even though they had work records which would not bar their rehire and Respondent had vacancies in those positions. Furthermore, Sharpe in his testimony conceded that Respondent's decision to reimplement the anti-nepotism policy was prompted to some extent by a desire to avoid the family riffs between management officials and employee relatives occasioned by union organization issues.

The General Counsel's prima facie violation with respect to the 8(a)(4) and (1) allegations concerning Charles Pegram and Honeycutt is made out by the resentment of Respondent demonstrated in White's statement regarding Honeycutt is "having dragged" Respondent through "court." The resentment to Charles Pegram for the same reason may reasonably be inferred since he also testified against Respondent in the same NLRB proceeding. Accordingly, I conclude that the burden shifts to Respondent under *Wright Line* to demonstrate that it would not have rehired the three alleged discriminatees even in the absence of their protected conduct under the Act.

There can be no doubt, as Respondent argues, that its anti-nepotism policy had some very obvious and legitimate purposes. Indeed, the policy was initially formulated and instituted many years prior to the advent of the union organization issue in the plant. However, it had been universally ignored for many years so that reimplementation had the effect of creating a new policy. The issue here is whether the return to the rule or policy was prompted by Respondent's desire to avoid rehiring of union supporters.

There are several factors pointed to by Respondent which tends to support its case that the return to the old

policy would have been made without regard to the rehire issue of the Pegrams and Honeycutt. Thus, there is Sharpe's testimony not specifically contradicted, that the request of supervisor Doug Gentle in February that his son be hired by Respondent called Sharpe's attention to the nepotism problem, not the rehire applications of the Pegrams and Honeycutt. And, contrary to the contention of the General Counsel, Sharpe testified with corroboration from Lamberth and personnel clerk Brenda White that the decision to return to the old policy was made in late February even though the memo on the subject was not written until March 1. Moreover, there is little evidence to contradict Sharpe's further testimony that prior to the reimplementation of the anti-nepotism policy, the positions for which the Pegrams and Honeycutt were qualified were simply filled with rehires who were better qualified. Accordingly, Respondent asserts that the General Counsel has failed to establish disparate treatment.

As further evidence of the lack of disparate treatment of the three and in support of its argument that it has rebutted the General Counsel's case, Respondent points out that all the new hires placed into the positions for which the Pegrams and Honeycutt were qualified were former employees rather than completely new hires. To the extent such rehires may not have been senior to the Pegrams and Honeycutt, Respondent asserts that the Pegrams and Honeycutt like all the rehires who had been off more than 6 months did not have seniority so that seniority was not a consideration.

Finally, Respondent argues that following reimplementation of the anti-nepotism policy, the rule has been rigidly enforced and presented evidence that six other applicants have been denied employment under the policy since March 1.[9]

After careful consideration of the arguments and the record I am persuaded that the preponderance of the evidence supports the complaint allegations and Respondent has not successfully rebutted the General Counsel's case. The record initially would suggest that neither Honeycutt nor the Pegrams so distinguished themselves in union activities as to make them likely targets for discrimination. However, one must consider that at least Charles Pegram and Honeycutt did distinguish themselves in giving testimony in the prior Board proceeding before Respondent. Further, one must also consider that they were distinguished in their union activity by virtue of their relationship to Respondent's supervisors. It was that relationship which served as a particular embarrassment to Respondent as revealed by the comments attributed to George Honeycutt by his daughter to the effect that he felt himself disgraced by her union activity. A similar embarrassment to Rayford Clanton by the Pegrams' union activity may be inferred from Clanton's remarks that the Pegrams "showed their ass" in such activity. Thus, the record clearly establishes not only the identification by Respondent of the Pegrams and Honeycutt as union activists and supporters but also their distinction as probable objects of retaliation for such

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[9] None of these applicants, however, appear to be rehires as opposed to new hires.

activism. And both George Honeycutt and Rayford Clanton directly related to the alleged discriminatees as already set forth herein that it was their union activism which would preclude their reemployment.

To the extent that Respondent admits that its reimplementation of the anti-nepotism policy was based upon its desire to avoid internal family disputes brought about by union organization issues, Respondent admits a discriminatory purpose with respect to rehire situations. It is one thing to return to the anti-nepotism policy and to apply it to prospectively to new hires in order to avoid family squabbles over union issues. It is quite another thing to reimplement the policy and apply it retroactively to avoid the rehire of former employees because they unfortunately encountered internal family disputes involving members of Respondent's management simply because they exercised their rights under the Act to engage in union activity. In the latter case, the discrimination is clear for it is a direct response too past union activity. A further intent to discriminate may be inferred from the result accomplished and the absence of evidence here to show that rehire applicants who were related to management but who had supported Respondent against the Union were similarly denied reemployment after the implementation of the anti-nepotism policy.

That there was no great urgency or underlying concern of great moment in the rush to reapply the anti-nepotism policy to rehires aside from retaliation for union considerations is demonstrated by the fact that Respondent "grandfathered" in its current employees. Every argument Respondent advances for its decision to reinforce the anti-nepotism policy applies with equal force to its current employees so as to logically dictate their terminations.

This includes an argument by Sharpe that a consideration for reimplementation was the establishment of a liberalized job bidding procedure[10] in the plant in July which increased the possibility that employee relatives of supervision would wind up being supervised by their relatives, a situation which would also violate Respondent's rules. I specifically reject Sharpe's testimony that this was a consideration because the liberalized policy procedure was not initiated unti' months after the decision to reimplement the anti-nepotism rule. On the basis of this record, this defense is pure afterthought.

I do not agree with the General Counsel's argument that the record establishes that Respondent decided to reinstitute the anti-nepotism rule sometime later than March 1. That argument is based on pure speculation and goes against the clear weight of the evidence including the uncontradicted testimony of Sharpe, Lamberth, and White that the decision was made in the latter part of February. Nevertheless, based upon the clear evidence of Respondent's clear knowledge of the union activity and inclinations of the three discriminatees, the evidence of specific union animus against them including comments by management representatives already discussed which connects the refusal to rehire with the discriminatees' involvement in prior union activity, Respondent's concession that an effort to avoid internal family

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[10] The change in the job bidding in effect allowed on the basis of plant seniority rather than department seniority as had previously been the case. At the same time, Respondent extended recall rights to laid off employees to one year rather than 6 months. This change was not applied retroactively and therefore was not applicable to Elaine Honeycutt.

squabbles between management and employee relatives due to employee union activity was a consideration in thereturn to the anti-nepotism rule, and the disparate application of the anti-nepotism rule to refuse to to rehire union adherents whose only disqualification for employment was their relationship to management officials while Respondent retained in its employ employees who were relatives of management, I conclude that Respondent has failed to successfully rebut the General Counsel's prima facie case. In short, Respondent has not demonstrated that Honeycutt and the Pegrams would not have been rehired in the absence of their protected conduct. I, therefore, find that Respondent violated Section 8(a)(3) and (1) of the Act in refusing to rehire the Pegrams and Honeycutt.

I further find, as alleged and argued by the General Counsel, that Respondent violated Section 8(a)(4) and (1) of the Act in refusing to rehire Charles Pegram and Elaine Honeycutt. In reaching this conclusion, I rely specifically on the remark by White reflecting Respondent's deep animosity toward Honeycutt, and inferentially Pegram, for their temerity in taking Respondent to "court" in the prior unfair labor practice proceeding.

C. The Discharge of Smith

1. The material facts

Jeffrey Smith began working for Respondent on a summer job at the age of 16 but quit. He was rehired in December 1978 and worked until he again quit in July 1981. It is undisputed that his job performance and attendance record during that period of employment was so unimpressive that when he again sought employment by Respondent in March, it was necessary for Arlene Smith, a

20-year employee of Respondent, to intercede in his behalf and persuade representatives of management, including Sharpe, to rehire him. Jeffrey Smith was rehired on March 14, but conceded herein that he was told upon rehiring that Respondent had reservations about it, that he would have to abide by all the rules and regulations on attendance, and that he would be carefully watched. Smith agreed that he would be a better employee.

Smith began his 90-day probationary period as a loom cleaner but subsequently bid into a weaver position. He missed a day of work on April 13 due to illness. He was absent on April 16 but was given permission for the absence[11] and Mrs. Smith worked in her son's place on that date. On April 29, Smith was given a talk sheet for poor job performance. Smith was again ill and absent on May 2, and was given a talk sheet for the absence.[12] On May 26, he left work due to illness, and on June 14 and 15, he again missed work due to illness. When Smith reported for his next scheduled shift after June 15, he was sent home and told to come back the next day to see weaving superintendent Cook and department head J. C. Waugh.

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[11] In spite of the permission to be off work on April 16, Smith's absence was not excused under the terms of Respondent's attendance control procedures. In short, the absence was counted against him.

[12] A "talk sheet" is a written recording of a critical supervisory comment to an employee regarding job performance. Under Respondent's procedures, three talk sheets given to an employee within their 90-day probationary period was basis for an "automatic discharge." Attendance policies provided for a verbal warning rather than a talk sheet for the first absence of a probationary employee.

Suspecting that he might be discharged, and upon advice of an attorney who was representing him in a bankruptcy proceeding to take a witness with him to the meeting with Cook and Waugh to verify that his absence was due to illness, Smith took Elaine Honeycutt with him to the plant on June 16. There he met initially with Cook in Cook's office. Cook refused to allow Honeycutt to attend even though at the outset of the meeting Smith explained that he had brought Honeycutt to verify that he had been ill during his absence on June 14 and 15. Although Cook allowed Smith to bring a tape recorder into the meeting, he declined Smith's request to use it. Cook began the meeting inquiring of Smith about any problems he was having on the job, and Smith replied that he had none adding the one he had had previously with the loom fixers had improved. At about this point, according to Smith's testimony, Waugh entered the meeting and the discussion turned to Smith's absences. Smith protested that one of those days he had been off with permission, but White responded that he didn't care and asked Smith what he thought ought to be done. Smith replied that he would do better if he was given a chance. White ended the meeting saying that he wanted to talk the matter over with Waugh.

Smith returned to the plant lobby and waited. White and Waugh thereafter came and got him and took him to the personnel office where the three met with Sharpe. Sharpe advised Smith that his services were no longer needed because he had been out too many days during his probationary period. Sharpe offered some suggestions to Smith regarding changes he might make before looking for other employment, but Smith curtly responded with his own suggestion that Sharpe mind his own business. The meeting ended after an argument over whether Smith was

entitled to his paycheck on the spot and Sharpe's threat to call the police if Smith did not leave.

Still according to Smith, about a week after his discharge, he returned to the plant to clean out his locker and talk to White. While there he saw Waugh and asked him if Waugh thought he had been belligerent in his discussion with Cook and Waugh. Waugh refused to comment saying only that Smith was trying to catch him in the middle of things. Subsequently, Smith talked to White and explained that his absences were occasioned by illness and he could not understand why he had been treated as he was particularly since his last 2-day illness had come beyond the completion of 90-calendar day probationary period. White's response was that his hands were tied and there was nothing he could do, but added that if Smith had come and talked to White before talking to Cook and Waugh on the day of the discharge, Smith would not have lost his job. Nevertheless, White told Smith he would look into the matter and see if anything could be done and would thereafter communicate with Mrs. Smith. White's subsequent report to Arlene Smith has already been related.

Respondent's version of the discharge of Smith was related through Cook and Sharpe. Cook testified that Smith was rehired for his last period of employment only with some reluctance in view of his earlier attendance and attitude problems. Cook testified that after each absence during Smith's last employment he talked to Smith about the absence, and after the May 2 absence told Smith that he was exceeding the absentee guidelines and not living up to his commitment on better attendance he made when rehired. When Smith missed June 14 and 15, Cook discussed the matter with Sharpe and it was decided that he should be called in to talk with Cook and Waugh. Cook

concedes that there was no decision to discharge Smith at that point and that that decision was only made after the meeting with Smith when Smith flippantly told Smith there was no need of talking, that they should go ahead and do whatever they wanted, that whatever Smith had to say would make no difference, that Smith was not going back out and work for supervisor Clint Billings, that all the supervisors wanted was to push employees without any concern for why employees have to be absent from work. Further, Smith added, according to Cook, that there were certain supervisors he could not and did not plan to work for and complained of the treatment of specific supervisors. Cook sent Smith back to the lobby and then proceeded with Waugh to see Sharpe. Cook testified that he recommended to Sharpe that in view of Smith's attitude to the effect he didn't need to be corrected and also because of his absentee record Smith should be discharged. More particularly with respect to Smith's absences, Cook testified it was not the basis for the absences which concerned him but rather the number of absences. Sharpe agreed with the recommendation and Smith was called in and discharged.

Sharpe's testimony generally corroborated that of Cook. Further, according to Sharpe, the reason for the discharge decision which he, Waugh and Cook arrived at was Smith's failure to live up to his commitment on rehire and their belief that it would be putting off the inevitable if he was not discharged at the point of leaving his probationary period and before becoming a regular employee. Moreover, Sharpe pointed out that Respondent had grounds for automatically discharging Smith after his May 2 absence. In this regard, Sharpe pointed out that under normal procedures, Smith should have received a talk sheet after his April 16 absence so that after his May 2 absence, he would have had a total of three talk

sheets rather than two. Smith's failure to receive a talk sheet after the April 16 absence was simply due to the oversight of the attendance clerk according to Sharpe.

2. Arguments and conclusions

The General Counsel argues regarding Jeffrey Smith that he was discharged simply because he antagonized and provoked Respondent by bringing a known union adherent, Honeycutt, to assist him on June 16. This was demonstrated, according to the General Counsel, by Cook's admission that no discharge decision was made until Smith reported to the plant on June 16, and by White's statement to Arlene Smith to the effect that the presence of Honeycutt constituted an implied threat to Respondent and had it not been for that, Jeffrey would still have had his job. Further, the General Counsel argues that Cook, in effect, admitted to Arlene Smith that Jeffrey Smith had not said anything in his meeting with Cook to demonstrate a bad attitude. Arlene Smith's testimony in this regard was that on June 16 after Jeffrey's discharge, Cook explained to her that he had intended to put him back to work but that he had come in with a "mistrustful attitude." When she asked him what Jeffrey Smith had said or told him, Cook replied, "Well, you can have a bad attitude without saying or doing anything, it is more how you act."[13] Finally, the General Counsel contends that Respondent's evidence does not in fact establish that Jeffrey Smith had a "bad attitude" on June 16 prior to the time his discharge was announced.

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[13] Arlene Smith's testimony regarding Cook's comments was not specifically contradicted by Cook. Accordingly, and because I found Arlene Smith to be a credible witness, I find Cook made the remarks attributed to him by her.

Based on the factors enumerated above, I find that the General Counsel established a prima facie violation of Section 8(a)(3) and (1) of the Act with respect to Jeffrey Smith's discharge. Respondent's evidence and argument in rebuttal must be considered next.

Respondent's defense is based essentially upon Cook's testimony already set forth regarding Jeffrey Smith's "attitude" on June 16. Comparison of the testimony of Jeffrey Smith and Cook shows relatively little conflict. In short, much of what each attributed to the other is not specifically denied on the record. Therefore, I conclude that Jeffrey Smith did in fact display a less than totally cooperative attitude in the meeting with Cook and Waugh, and subsequently in the meeting with Sharpe. The critical issue to be resolved, however, is whether Smith was initially contrite and subsequently provoked into belligerency by actions or remarks by Cook reflecting the futility of attempting to placate Respondent. That he was initially provoked was clearly the case in the meeting with Sharpe for the evidence reflects Smith's impudent responses were made after Sharpe announced the discharge. I am also persuaded this was also the case in the earlier meeting with Cook. In reaching this conclusion, I note that Cook admitted that Smith asked him for another chance. It would be illogical and unreasonable for Smith to assert that he was not going back out and work with his supervisors and then shortly thereafter ask for a second chance. It is more reasonable to believe that the request for a second chance came first in a spirit of contrition.

It is beyond dispute that Smith had a poor attendance record, but Respondent had not seen fit to discharge him for either that reason or his work performance prior to June 16. Further, Smith's last absence occurred outside

his normal probationary employment. Indeed, Respondent admits that it had no intention of discharging Smith for the absences when Cook arranged to meet with him on June 16. In view of this, and in light of Smith's early request for another chance, and since Respondent had no significant "attitude" problem with Smith before June 16, Cook's recommendation that Smith be discharged, I conclude, masks a clear ulterior motivation.

Any doubt as to that ulterior motivation is removed by White's remarks to Arlene Smith which unquestionably established that it was Honeycutt's accompaniment and support of Jeffrey Smith and Respondent's extreme animosity to Honeycutt as a result of her union involvement which prompted the discharge decision. White put it very succinctly in stating that if someone other than Honeycutt had accompanied Smith he would have retained his job.

It is true, of course, that White did not participate in the decision to discharge Smith. Under such circumstances, one might be inclined to dismiss his remarks on the subject as simply an opinion, albeit coercive. See e.g *Garrett Flexible Products, Inc. and Plastic Processors, Inc.*, 270 NLRB No. 173 (1984). Here, however, it must be noted that White made his remarks to Arlene Smith only after he had investigated the matter. Further, after the investigation, he specifically attributed to Respondent the basis for the decision by reporting to Arlene Smith "they were saying" that Jeffrey made an implied threat when he brought Honeycutt with him on June 16. That was the "attitude" problem that Respondent found most distasteful, for White related no other "attitude" problem to Arlene Smith. Cook himself was no

more specific in his subsequent conversation with Arlene Smith regarding Jeffrey Smith's "mistrustful attitude."

Considering the foregoing, the elements of the General Counsel's prima facie case, and upon evaluation of all the record evidence, I conclude that Respondent has failed to demonstrate that Jeffrey Smith would have been discharged without regard to his accompaniment on June 16 by Honeycutt, an individual who had incurred Respondent's animosity due to her earlier protected activities. Accordingly, I conclude that Smith's discharge constituted discrimination under the Act in violation of Section 8(a)(3) and (1).

Conclusions of Law

1. Respondent, Uniglass Industries, Div. United Merchants & Mfrs., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC, is a labor organization within the meaning of Section (2)(5) of the Act.

3. Respondent by it supervisor and agent Rayford Clanton on October 12, 1983, violated Section 8(a)(1) of the Act by informing employees that they would not have been laid off and would have been rehired but for their involvement in union activities.

4. Respondent by its supervisor and agent Raymond White on June 28, 1983, violated Section 8(a)(1) of the Act by informing employees that certain other employees would not have been discharged had they not sought the assistance of an employee involved in union or other protected concerted activity.

5. By refusing to rehire employee applicants Elaine Honeycutt and Charles Pegram because of their prior involvement in union activity and because they gave testimony under the Act, Respondent violated Section 8(a)(4), (3), and (1) of the Act.

6. Respondent in refusing to rehire Jeanette Pegram because of her activities on behalf of the Union violated Section 8(a)(3) and (1) of the Act.

7. Respondent did not violate Section 8(a)(4) of the Act in refusing to rehire Jeanette Pegram.

8. The aforesaid violations of the Act constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily refused to employ applicants Elaine Honeycutt, Charles Pegram, and Jeanette Pegram as a result of its reimplementation of its anti-nepotism rule and application of that rule to the three, it will be recommended that Respondent be required to offer these three individuals employment in positions for which they are qualified and in which they would have been employed but for the discrimination against them. It will be further recommended that Respondent be required to make them whole for any loss of earnings or other benefits, computed on a quarterly basis from the date that they would have been employed but for the discrimination against them to the date of a proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[14] Because it has also been found that Jeffrey Smith was unlawfully discharged, Respondent must be required to offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis, from the date of discharge to the date of proper offer of reinstatement, less any interim earnings plus interest under the authorities cited above. Consistent with the Board's decision in *Sterling Sugars*, 261 NLRB 472 (1982), it will also be recommended that Respondent be required to expunge from its files any reference to the discharge of Jeffrey Smith or the refusals to rehire Elaine

[14] See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717–721 (1962).

Honeycutt, and Charles and Jeanette Pegram and notify them in writing that this has been done and that evidence of the unlawful discharge or refusals to rehire will not be used for future personnel actions against them.

On the foregoing findings of fact, conclusions of law, and on the entire record, I issue the following recommended:[15]

ORDER

Respondent, Uniglass Industries, Div. United Merchants & Mfrs., Statesville, North Carolina, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Informing employees that they would have been rehired but for their involvement in activities on behalf of Amalgamated Clothing and Textile Workers union, AFL–CIO, CLC.

(b) Informing employees that other employees would not have been discharged if they had not sought the assistance of employees previously involved in protected concerted activities.

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[15] If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Discharging, refusing to hire, or otherwise discriminating against any employee because of their activity on behalf of the the above named Union or any other labor organization or because they gave testimony under the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Jeffrey Smith immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings and other benefits as a result of the discrimination against him in the manner set forth in the Remedy section of this Decision.

(b) Employ Charles Pegram, Jeanette Pegram, and Elaine Honeycutt into those positions for which they are qualified and in which they would have been employed but for the the discrimination against them, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and make them whole for any loss of earnings or other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of this Decision.

(c) Remove from its files any references to the unlawful discharge of Jeffrey Smith and the unlawful refusal to employ Charles Pegram, Jeanette Pegram, and

Elaine Honeycutt, and notify them in writing that this has been done and that the discharges or refusals to employ will not be used for future personnel actions against them.

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(e) Post at its facility in Statesville, North Carolina, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region II, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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[16] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 3, 1984.

Hutton S. Brandon
Administrative Law Judge

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 11

UNIGLASS INDUSTRIES, DIV. UNITED MERCHANTS & MFRS.

and Case No. 11-CA-11089

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC

COMPLAINT AND NOTICE OF HEARING

It having been charged by Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, herein called the Union, that Uniglass Industries, Div. United Merchants & Mfrs., herein called Respondent, has engaged in, and is now engaging in, unfair labor practices affecting commerce as defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned, hereby issues this Complaint and Notice of Hearing, pursuant to Section 10(b) of the Act, and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, and alleges as follows:

1.

The charge was filed by the Union on October 19, 1983, and was served on Respondent on October 19, 1983. An amended charge was filed by the Union on

December 2, 1983, and was served on Respondent on December 2, 1983.

2.

Respondent is now, and has been at all times material herein, a corporation operating a plant in Statesville, North Carolina, where it is engaged in the manufacture of synthetic fibers.

3.

During the preceding 12 months, which period is representative of all times material herein, Respondent received goods and raw materials from directly outside the State of North Carolina valued in excess of $50,000.

4.

Respondent, during the preceding 12-month period, which period is representative of all times material herein, manufactured, sold and shipped goods valued in excess of $50,000 directly to points outside the State of North Carolina.

5.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

6.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

7.

At all times material herein, the following-named persons occupied the positions set opposite their names, and have been, and are now, agents of Respondent, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act:

Raymond White	–	Plant Manager
Carl Sharpe	–	Personnel Manager
Rayford Clanton	–	Supervisor

8.

Since on or about April 20, 1983, Respondent failed and refused and continues to fail and refuse to rehire its employees named below:

Elaine Honeycutt
Charles Pegram
Jeanette Pegram

9.

Respondent discharged and thereafter failed and refused to reinstate its employee named below, on or about the date set opposite his name:

Jeffrey Smith	–	June 16, 1983

10.

Respondent failed and refused and continues to fail and refuse to rehire its employees named in paragraph 8 above, and discharged and failed and refused and continues to fail and refuse to reinstate its employee

named in paragraph 9 above, because said employees joined or assisted the Union or engaged in other union activity or concerted activities for the purpose of collective bargaining and mutual aid and protection.

11.

Respondent failed and refused and continues to fail and refuse to rehire its employees named in paragraph 8 above, because said employees gave testimony at an unfair labor practice hearing before the National Labor Relations Board in Cases Nos. 11-CA-9076, 11-CA-9258, 11-CA-9546, 11-CA-9605, and 11-CA-9809.

12.

Respondent by the acts described above in paragraphs 8, 9, 10 and 11, and by each of said acts, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

13.

Respondent, by the acts described in paragraphs 8, 9, and 10, and by each of said acts, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

14.

Respondent, by the acts described in paragraphs 8 and 11 above, and by each of said acts, has engaged in, and is now engaging in, unfair labor practices within the meaning of Section 8(a)(4) of the Act.

15.

The acts of Respondent described above constitute unfair labor practices affecting commerce within the

meaning of Section 8(a)(1), (3), and (4) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that in Statesville, North Carolina, at a time and date to be designated, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board, on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person or otherwise and give testimony. Form NLRB–4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

You are further notified that pursuant to Section 102.20 and Section 102.21 of the Board's Rules and Regulations, Series 8, as amended, you shall file with the Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to the said complaint within 10 days from service thereof and that unless you do so, all the allegations in the above complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Winston-Salem, North Carolina, this 2nd day of December 1983.

/s/Hugh Frank Malone

Hugh Frank Malone
Acting Regional Director
National Labor Relations Board
Region 11
447 Federal Building
251 North Main Street
Winston-Salem, N.C. 27101

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 11

UNIGLASS INDUSTRIES, DIV. UNITED MERCHANTS & MFRS.

and Case No. 11-CA-11089

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC

AMENDED COMPLAINT AND NOTICE OF HEARING

It having been charged by Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, herein called the Union, that Uniglass Industries, Div. United Merchants and Mfrs., herein called Respondent, has engaged in, and is now engaging in, unfair labor practices affecting commerce as defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq., herein called the Act, and a Complaint and Notice of Hearing having issued on December 2, 1983, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned, hereby issues this Amended Complaint and Notice of Hearing, pursuant to Section 10(b) of the Act, and Section 102.15 and 102.17 of the Board's Rules and Regulations, Series 8, as amended, and alleges as follows:

1.

The charge was filed by the Union on October 19, 1983, and was served on Respondent on October 19, 1983.

An amended charge was filed by the Union on December 2, 1983, and was served on Respondent on December 2, 1983.

2.

Respondent is now, and has been at all times material herein, a corporation operating a plant in Statesville, North Carolina, where it is engaged in the manufacture of synthetic fibers.

3.

During the preceding 12 months, which period is representative of all times material herein, Respondent received goods and raw materials from directly outside the State of North Carolina valued in excess of $50,000.

4.

Respondent, during the preceding 12-month period, which period is representative of all times material herein, manufactured, sold and shipped goods valued in excess of $50,000 directly to points outside the State of North Carolina.

5.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

6.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

7.

At all times material herein, the following-named persons occupied the positions set opposite their names, and have been, and are now, agents of Respondent, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act:

Raymond White	-	Plant Manager
Carl Sharpe	-	Personnel Manager
Rayford Clanton	-	Supervisor

8.

Since on or about April 19, 1983, and continuing to date, Respondent, by its following-named agents and supervisors at its Statesville, North Carolina, plant, on or about the date set opposite their names, has interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, by the following acts and conduct:

(a) Informed its employees, by telephone, that they would not have been laid off or that they would have been rehired if they had not engaged in union activities:

Rayford Clanton	-	October 12, 1983

(b) Informed its employees that certain employees would not have been discharged if they had not sought the assistance of other employees who had engaged in union and/or other protected concerted activities:

Raymond White	-	June 28, 1983

9.

Since on or about April 20, 1983, Respondent failed and refused and continues to fail and refuse to rehire its employees named below:

Elaine Honeycutt
Charles Pegram
Jeanette Pegram

10.

Respondent discharged and thereafter failed and refused to reinstate its employee named below, on or about the date set opposite his name:

Jeffrey Smith – June 16, 1983

11.

Respondent failed and refused and continues to fail and refuse to rehire its employees named in paragraph 9 above, and discharged and failed and refused and continues to fail and refuse to reinstate its employee named in paragraph 10 above, because said employees joined or assisted the Union or engaged in other union activity or concerted activities for the purpose of collective bargaining and mutual aid and protection.

12.

Respondent failed and refused and continues to fail and refuse to rehire its employees Elaine Honeycutt and Charles Pegram named in paragraph 9 above, because said employees gave testimony at an unfair labor practice hearing before the National Labor Relations Board in

Cases Nos. 11-CA-9076, 11-CA-9258, 11-CA-9546, 11-CA-9605, and 11-CA-9809.

13.

Respondent by the acts described above in paragraphs 8, 9, 10, 11, and 12, and by each of said acts, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

14.

Respondent, by the acts described in paragraphs 9, 10, and 11, and by each of said acts, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

15.

Respondent, by the acts described in paragraphs 9 and 12 above, and by each of said acts, has engaged in, and is now engaging in, unfair labor practices within the meaning of Section 8(a)(4) of the Act.

16.

The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (4) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 9th day of January 1984, at 10 a.m., EST, in the Courtroom, United States Post Office, Statesville, North Carolina, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board, on the

allegations set forth in the above complaint, at which time and place you will have the right to appear in person or otherwise and give testimony. Form NLRB–4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

You are further notified that pursuant to Section 102.20 and Section 102.21 of the Board's Rules and Regulations, Series 8, as amended, you shall file with the Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to the said complaint within 10 days from service thereof and that unless you do so, all the allegations in the above complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Winston–Salem, North Carolina, this 13th day of December 1983.

/s/Willie L. Clark, Jr.

Willie L. Clark, Jr.
Regional Director
National Labor Relations Board
Region 11
447 Federal Building
251 North Main Street
Winston–Salem, N.C. 27101

List of Parent Company, Subsidiaries and Affiliates:

Sudamtex de Uruguay S.A.
S.C.I. de La Grande Rocade
Polimeros Uruguayos S.A.
Valchem (Australia) Pty. Limited
S.C.I. Barbusse Bobigny
Telmartex C.A.

Supreme Court, U.S.
FILED
SEP 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-47

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNIGLASS INDUSTRIES, A DIVISION OF UNITED MERCHANTS AND MANUFACTURERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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National Labor Relations Board
Washington, D.C. 20570

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Petitioner contends that the statute of limitations bars the Board's finding that petitioner violated the National Labor Relations Act by refusing to rehire three employees because of their protected activities.

1. In 1980, employees at petitioner's plant in Statesville, North Carolina, began a union organizing campaign that culminated in a Board-conducted election which the union lost. Employees Charles and Jeanette Pegram and Elaine Honeycutt were active in the union campaign. Pet. App. A9-A10. Early in 1981, the Board conducted a hearing on charges that petitioner committed unfair labor practices during that campaign. Elaine Honeycutt and Charles Pegram testified as witnesses for the General Counsel at that hearing (*id.* at A9). Prior to the hearing, Elaine Honeycutt was warned by her father (a supervisor employed by

petitioner) that she would lose her job if she testified. On several subsequent occasions Honeycutt's father rebuked her for testifying and again warned her that she would lose her job. *Id.* at A13.

In early 1982, petitioner laid off and subsequently terminated the Pegrams and Elaine Honeycutt (Pet. App. A11, A16-A17).[1] Following their terminations, the three employees applied for reemployment, updating their applications in each successive month. *Id.* at A11, A17. Beginning in January and February 1983, and continuing over the next several months, petitioner recalled laid off employees and hired new employees (*id.* at A11-A12, A17). It did not, however, rehire Elaine Honeycutt and the Pegrams to fill available positions for which they were qualified (*id.* at A15, A17-A18).

In June 1983, Elaine Honeycutt asked petitioner's assistant industrial relations director why she had not been rehired. Honeycutt was told that she was ineligible for employment under petitioner's anti-nepotism rule, a long-dormant policy that had been revived on March 1, 1983 (Pet. App. A12).

On September 18, 1983, Jeanette Pegram's brother, Ralph Clanton, asked Supervisor Rayford Clanton (another brother) when petitioner was going to rehire the Pegrams. Supervisor Clanton replied that he could not help them, adding that if the Pegrams " '[had] not shown their asses by trying to organize that stupid union they might still have been' " employed at the plant (Pet. App. A18-A19). On October 12, 1983, when the Pegrams again updated their employment applications, petitioner's Industrial Relations Director informed them that they were wasting their time

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[1]Under company policy, six months after an employee is laid off he is regarded as terminated.

because petitioner had reinstated its policy of not hiring relatives of supervisors (*id.* at A17).[2]

2. The Board, upholding the decision of the administrative law judge, found that petitioner violated Section 8(a)(4), (3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(4), (3) and (1), by refusing to rehire Elaine Honeycutt and Charles Pegram in retaliation for their testimony at a Board hearing and their union activities and violated Section 8(a)(3) and (1) by refusing to rehire Jeanette Pegram in retaliation for her union activities (Pet. App. A32).[3]

In finding that petitioner unlawfully refused to rehire the three employees, the Board rejected petitioner's defense that its actions were based on a neutral application of the anti-nepotism rule.[4] The Board found that the anti-nepotism rule was reimplemented in March 1983 to avoid hiring union adherents who were related to management personnel (Pet. App. A17-A32). The Board also rejected petitioner's contention (*id.* at A23) that the charges were time-barred by Section 10(b) of the Act, 29 U.S.C. 160(b).[5] Petitioner argued that since the anti-nepotism rule was

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[2]Two of Jeanette Pegram's brothers were supervisors (Pet. App. A17).

[3]The Board also found that petitioner had unlawfully discharged another employee, Jeffrey Smith, and had unlawfully warned employees that participation in protected activities could lead to discharge or preclude rehire (Pet. App. A21, A38-A40). The court of appeals upheld these findings and petitioner does not contest them in this Court.

[4]It was not alleged that the initial layoff decisions were discriminatory and the Board did not find that it was discriminatory for petitioner to recall other employees instead of these three employees prior to reviving the anti-nepotism rule (Pet. App. A11, A15-A18).

[5]Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

instituted on March 1, 1983, more than six months before the filing of the charge, its actions implementing that rule could not be found to be unlawful. The Board explained, however, that "the 6-month period of limitations prior to filing the charge * * * runs from the time that Honeycutt and the Pegrams were put on notice, actual or constructive, that they were not subject to rehire" (Pet. App. A24).

3. The court of appeals, in an unpublished order, upheld the Board's decision (Pet. App. A1-A4). The court found that substantial evidence supported the Board's finding that petitioner refused to rehire Honeycutt and the Pegrams because of their protected activities (*id.* at A3-A4). The court further agreed with the Board that the finding of those violations was not time-barred because "[u]nder the Act, the six-month limitation period 'does not begin to run until the aggrieved party knew or should have known that his statutory rights were violated' " (*id.* at A3).

4. Petitioner does not dispute the Board's findings, upheld by the court of appeals, that it refused to rehire the employees because of their support for the union. Petitioner argues only that the statute of limitations barred that finding. There is no merit to petitioner's contention, and it raises no issue warranting review by this Court.

Petitioner has no quarrel with the governing legal standard; it concedes (Pet. 20) that the six-month limitation period of Section 10(b) " 'does not begin to run until the aggrieved party knew or should have known that his statutory rights were violated.' " *Metromedia, Inc.* v. *NLRB*, 586 F.2d 1182, 1189 (8th Cir. 1978) (citation omitted). Petitioner challenges only the application of that settled rule to the facts of this case. Thus, because petitioner regards the revival of the anti-nepotism rule as the unfair labor practice found by the Board and because that action preceded the statutory period, petitioner contends that Section 10(b) poses an absolute bar.

That contention has no merit. The violation found by the Board was *not* reimplementation of the anti-nepotism rule.[6] Petitioner raised the anti-nepotism rule as an affirmative defense to the allegation that the refusal to rehire was unlawfully motivated. Accordingly, Section 10(b) did not bar the Board from considering and rejecting the anti-nepotism rule as a legitimate basis for its refusal to rehire, or from deriving support for its finding of unlawful motivation from the rule. *Local Lodge No. 1424* v. *NLRB (Bryan Manufacturing Company)*, 362 U.S. 411, 416 (1960), makes clear that Section 10(b) does not preclude the Board from relying on "earlier events [to] shed light on the true character of matters occurring within the limitations period."[7]

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[6]Even if the Board had found reimplementation of the anti-nepotism rule to be the predicate unlawful conduct, the three employees were not informed of petitioner's revival of that rule until months after its implementation and well within the six-month limitation period. Accordingly, even under petitioner's misreading of the Board's decision, the charge was timely.

Petitioner also contends (Pet. 19-22) that tolling of the statute of limitations is inappropriate here because the Pegrams and Honeycutt should have filed charges when they were not offered jobs in January 1983. That factual contention does not warrant review by this Court. In any event, it is without merit. Prior to the time petitioner informed the three employees that the anti-nepotism policy made them ineligible for rehire the employees were regularly updating their applications for employment—with petitioner's knowledge—without receiving any indication from petitioner that they would not be considered for employment. The fact that other individuals were hired for positions the three employees previously held clearly did not put them on notice that they could not be rehired. Indeed, as noted, *supra*, n.4, the Board did not find it unlawful for petitioner to select other applicants for openings that occurred prior to revitalizing the anti-nepotism rule.

[7]In *Bryan Manufacturing Company*, 362 U.S. at 417-419, the Board found that enforcement of the union shop clause of a collective bargaining agreement was an unfair labor practice because the union did not represent a majority of the employees at the time the contract was executed, almost a year prior to the filing of a charge. The Court held,

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board

SEPTEMBER 1986

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however, that the complaint was barred by Section 10(b) because enforcement of the clause—the only event occurring within the 10(b) period—derived its unlawfulness solely from the unlawful execution of the contract with a minority union, an event that antedated the Section 10(b) period. Here, on the other hand, petitioner's discriminatory refusal within the Section 10(b) period to rehire the three employees was the unlawful act; the anti-nepotism rule was considered merely in assessing petitioner's defense.

DOJ-1986-09